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No. 80-2019

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT WYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who was advised at a pretrial conference that his joint trial with six other defendants would commence five days thereafter, but who nonetheless failed to appear, was properly tried *in absentia*.

2. Whether the trial court instructed the jury incorrectly concerning inferences that could be drawn from petitioner's failure to appear at trial.

3. Whether petitioner was denied effective assistance of counsel at trial.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1980. A petition for rehearing was denied on February 5, 1981 (Pet. App. B). Mr Justice Marshall extended the time for filing a petition for a writ of certiorari to May 6, 1981, and on June 1, 1981, the petition was filed as of May 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a nine-day jury trial in the United States District Court for the Southern District of New York, conducted without his presence, petitioner was convicted on May 4, 1978, of conspiring to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846, and on four substantive counts of distribution and possession with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Apprehended two years thereafter, he was sentenced to consecutive terms of 10 years' imprisonment on the conspiracy count and the first substantive count, and concurrent terms of 10 years' imprisonment on the remaining substantive counts. The court of appeals affirmed by an unpublished per curiam order (Pet. App. A).

Petitioner was present at a pretrial conference in his case on April 11, 1978, at which all parties were notified by the court that trial would commence on April 24, 1978 (Pet. 3). Petitioner did not appear on the scheduled trial date (Pet. 4). Petitioner's counsel, Michael Stalonas, informed the court that he had last spoken to petitioner on April 21 and did not know where petitioner was or the nature of his reasons for not appearing (Tr. 12, 49).[1] The district court decided to commence the trial—which involved six other defendants—and try petitioner *in absentia*, pursuant to Rule 43(b)(1), Fed. R. Crim. P. (Pet. App. 2a).

The evidence, presented through more than one hundred exhibits and the testimony of two accomplices—Gary Eller and Richard Fusco—and five other witnesses, showed that

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[1] "Tr." refers to the trial transcript; "P. Tr." refers to the transcript of a pretrial conference; "A." refers to the appendix in the court of appeals; "GX" refers to the government's trial exhibits. All record references are based on those in the government's brief in the court of appeals.

between September 1, 1976, and February 1, 1977, petitioner supplied large quantities of cocaine to Eller and Fusco in New York for resale and distribution in Washington, D.C., and Virginia Beach, Virginia. Specifically, petitioner sold eight ounces of cocaine for $8300 in October 1976, another eight ounces for $8700 in November 1976, three ounces for $3600 in December 1976, and one pound for an agreed price of $19,200 later the same month.

ARGUMENT

1. Petitioner contends (Pet. 12-13) that because he was not "initially present" when his trial "commenced," as specified in Fed. R. Crim. P. 43(b)(1),[2] the trial court erred in trying him *in absentia*. Petitioner also argues (Pet. 14-15) that the trial court erred in declining to conduct a hearing on the question whether petitioner's absence was voluntary. The contentions are without merit.

a. It has long been established that a defendant in a noncapital case who is not in custody may waive his right to be present at trial by voluntarily absenting himself. *Diaz* v. *United States*, 223 U.S. 442, 455 (1912); see also *Taylor* v. *United States*, 414 U.S. 17 (1973). Rule 43 merely restates that proposition; and it has consistently been construed to

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[2]Rule 43, Fed. R. Crim. P., provides in pertinent part:

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
>
> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial) * * *.

permit a court to avoid disrupting a scheduled trial by going forward in the absence of a defendant notified of the trial date, whether the disruption is threatened by the defendant's disappearance after an initial appearance at trial or by his failure to appear when the other parties and counsel have assembled for the trial's commencement. *United States* v. *Peterson*, 524 F. 2d 167, 183-184 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); see also *United States* v. *Tortora*, 464 F. 2d 1202, 1210 n.6 (2d Cir.), cert. denied, 409 U.S. 1063 (1972); *Government of the Virgin Islands* v. *Brown*, 507 F. 2d 186, 189 (3d Cir. 1975); *United States* v. *Powell*, 611 F. 2d 41 (4th Cir. 1979).[3] As the Third Circuit explained in *Government of the Virgin Islands* v. *Brown*, *supra*, 507 F. 2d at 189, an absolute rule that a defendant duly notified of his trial date could never be found to have waived his right to be present so long as he took the precaution of failing to make an appearance on the day set for the commencement of the trial "runs counter to common sense and would be a travesty of justice." It "would allow an accused at large upon bail to immobilize the commencement of a criminal trial and frustrate an already overtaxed judicial system until the trial date meets, if ever, with his pleasure and convenience." *Ibid.*

b. Contrary to petitioner's further contention, the district court was not required to conduct a hearing to determine whether petitioner's absence was voluntary. In light of

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[3]In *United States* v. *Benavides*, 596 F. 2d 137, 139 (5th Cir. 1979), the Fifth Circuit accepted the proposition that a waiver of presence may be found where the accused, knowing the trial date, has failed to appear on the first day of trial. It held, however, that in the circumstances of that case the trial court abused its discretion in ordering a trial *in absentia* because there were no severance problems or other factors militating in favor of immediate trial. In *Benavides* there were only two defendants, and both had absconded. By contrast, the trial here involved six defendants in addition to petitioner, and a severance was the only alternative to a trial *in absentia*.

his counsel's disavowal of any knowledge of petitioner's whereabouts or his reason for not appearing, and in the absence of any circumstances suggesting that petitioner might have been prevented by other persons from appearing in court, a hearing would have been futile. The court could presume that petitioner, having been advised 13 days earlier of the date that trial would commence, had voluntarily absented himself—subject, or course, to reconsideration of that finding should petitioner appear later with an explanation.[4]

Contrary to petitioner's suggestion (Pet. 14), *Drope* v. *Missouri*, 420 U.S. 162 (1975), does not support his contention that he was entitled to a hearing on whether his absence was voluntary. In *Drope*, the question of the voluntariness of the defendant's absence from his trial—which resulted from his hospitalization following a suicide attempt—was intertwined with the question of his competence to stand trial. The Court held only that the trial court had made insufficient inquiry into the latter question.[5]

2. There is similarly no merit to petitioner's contention (Pet. 15-16) that the trial judge committed reversible error by failing to instruct the jury that it was to consider whether

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[4]When petitioner was apprehended two years after his conviction, he explained that he had absented himself from trial because his attorney was unprepared. This explanation does not negate the voluntariness of his absence. It merely indicates that when petitioner, according to his own account, lost confidence in his retained counsel on or before April 11, 1978 (Pet. 2-3), he chose to continue with representation by that attorney and then abscond before trial, rather than discharge his attorney, seek new counsel, and move in advance of trial for a continuance to allow new counsel to become familiar with his case.

[5]*Taylor* v. *United States*, *supra*, and *United States* v. *Eskew*, 460 F. 2d 1028 (9th Cir. 1972), on which petitioner also relies (Pet. 14-15), merely noted that hearings had been held on the voluntariness question. They do not suggest that hearings must be held when there is nothing to hear.

petitioner's absence was voluntary and that it could find that even a voluntary absence was the result of motives other than consciousness of guilt.

Just as there was no basis for a hearing by the trial judge on the voluntariness of petitioner's totally unexplained failure to appear, there was no basis for a jury finding on that question. And, as noted, petitioner's explanation, after his apprehension two years later, showed that he had in fact made a deliberate decision not to appear for his trial.

The court's instruction as to permissible inferences from a voluntary nonappearance did not, as petitioner suggests, prejudice him by requiring the jury to find that his nonappearance was evidence of guilt. The court simply instructed the jury (A. 615) that (as the parties had stipulated) petitioner had been advised of the trial date and that there was therefore "no question" that he knew that his appearance was required on that date and throughout the trial. The court then stated (A. 616; emphasis added) that a knowing nonappearance "*may* tend to prove consciousness of guilt" and thus "*may* be considered and weighed" by the jury "in connection with all the other evidence." It emphasized (A. 615-616) that it was for the jury to decide whether petitioner's nonappearance showed a consciousness of guilt and "the significance, if any" to be attached to it. This instruction was, we submit, unexceptionable.

Finally, while an objection was made on petitioner's behalf to the giving of any flight instruction at all, no objection was made to the content of the instruction. In the absence of objection, any error in the instruction was harmless. *Austin* v. *United States*, 414 F. 2d 1155, 1158 (D.C. Cir. 1969).

3. Petitioner's claim of ineffective assistance of counsel, which he first raised by a motion to set aside the verdict after

he was apprehended, is based on the allegation—supported by his own affidavit and that of Michael Stalonas, his trial attorney—that Stalonas had never consulted with him about trial strategy or potential defenses, had never investigated the case or interviewed potential defense witnesses, and, as a result, was unprepared for trial (Pet. 2-5). According to both affidavits, Stalonas's lack of preparation resulted primarily from his commitments on other criminal matters. The trial court stated, however, that regardless of whether Stalonas had conferred with petitioner, he functioned "quite effectively" as lead counsel throughout the trial (A. 738), and on that basis it denied the motion without a hearing.

The court of appeals, in affirming, stated (Pet. App. 2a; citation omitted) that the conduct of petitioner's defense "did not 'shock the conscience of the Court' or 'make the proceedings a farce and mockery of justice.' " Petitioner correctly states (Pet. 6) that this standard differs from the standard adopted by most other circuits for evaluation of the effectiveness of assistance of counsel. We submit, however, that this affords no ground for review in petitioner's case. The most recent of the two authorities cited by the court in affirming petitioner's convictions, *Brinkley* v. *Lefevre*, 621 F. 2d 45 (2d Cir. 1980), cert. denied, No. 79-6889 (Oct. 6, 1980) (per curiam), is one of a number of recent Second Circuit cases[6] indicating that court's willingness to reconsider its "farce and mockery" standard for testing such Sixth Amendment claims if presented with a case in which the result would be different "under the standards adopted by other Circuits (e.g., reasonably effective

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[6] *United States* v. *Aulet*, 618 F. 2d 182, 187 (2d Cir. 1980); *Twitty* v. *Smith*, 614 F. 2d 325, 333 (2d Cir. 1979); *Bellavia* v. *Fogg*, 613 F. 2d 369, 374 (2d Cir. 1979); *Indiviglio* v. *United States*, 612 F. 2d 624, 629 n.8 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980); *United States* v. *Menendez*, 612 F. 2d 51, 55 (2d Cir. 1979).

assistance)." 621 F. 2d at 47. The record in this case both sustains the trial court's finding concerning the competence of petitioner's trial attorney and makes it clear that, contrary to petitioner's contention (Pet. 6-7), this case is an inappropriate vehicle for reviewing the standards applied by the different circuits to Sixth Amendment ineffective assistance claims and for prescribing a single formulation. The same result would be reached under the more liberal test for which petitioner contends.

Thus, the transcript of a pretrial conference held April 19, 1978, indicates that Stalonas had already listened to tapes of conversations between petitioner and Fusco (P. Tr. 21). On April 21, Stalonas was provided, together with the other defense counsel, with Fusco's and Eller's Jencks Act statements and copies of all government exhibits, including the tape of a key conversation on December 13, 1977, between petitioner and Fusco; Stalonas listened to the latter tape on highly sensitive equipment supplied by the United States Attorney's office (see Tr. 17). He successfully moved to redact the transcript of the tape by deleting references to weapons, dynamite, and acts of violence (Tr. 22, 24). Although his motion to exclude the tape in its entirety on grounds of inaudibility was denied (Tr. 63), he stressed in his opening statement and in his summation to the jury that the tape was too inaudible to be given any credence (Tr. 93, 1519).

During trial, Stalonas cross-examined both Eller and Fusco effectively and at length. For example, he developed Eller's extensive prior criminal activity (Tr. 225, 301), and on that basis argued in summation that Eller, faced with state drug charges carrying a mandatory life sentence, was motivated to frame petitioner and was lying under oath (Tr. 1496-1497, 1510, 1511). He brought out evidence that Eller had a big cocaine source in Florida (Tr. 301, 431, 432), and argued to the jury that it was the Florida dealer and not

petitioner who was Eller's source (Tr. 1496-1497, 1510-1511). He also brought out that, despite Eller's testimony that petitioner had been a reliable and ready cocaine source, Eller was unable, after he became a DEA informant, to buy any cocaine from petitioner (Tr. 305). This fact was also argued to the jury (Tr. 1513).

Similarly, Stalonas developed Fusco's prior criminal record and showed that Fusco was also facing serious felony charges that gave him a motive to frame petitioner rather than testify truthfully (Tr. 869-880). Stalonas also brought out that Fusco was a heavy cocaine user during the period covered by the indictment, and on that basis argued to the jury that Fusco's powers of recollection had been distorted. His questioning also produced testimony that Fusco had purchased an after-hours club from petitioner and still owed a large sum of money on the deal (Tr. 865, 892). The December 13 tape reflected a $10,000 payment from Fusco to petitioner, and petitioner had acknowledged that this satisfied a debt that Fusco owed by reason of his loss, through police seizure, of cocaine which petitioner had advanced to him (Tr. 836; GX 53, 53A). On the basis of the cross-examination, Stalonas argued to the jury that the $10,000 was actually payment for purchase of the club (Tr. 1519).[7]

Finally, Stalonas took the lead among defense counsel in objecting to the government's examination of Eller and Fusco (Tr. 137, 153, 155, 157, 159, 165, 167, 181, 202-203, 213-214, 218, 219, 221, 589, 590, 591, 593-594, 599, 601, 605, 607, 610-613, 669, 778, 783, 790-792, 794, 796, 798, 799, 803,

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[7]In the affidavit in support of his motion to set aside the verdict, as well as in his certiorari petition (Pet. 3), petitioner alleges that the $10,000 was payment for the return of an automobile. It does not appear that that explanation would have been any more readily accepted by the jury than the argument that it was payment for the club.

805, 815, 820, 823-826, 840, 841), frequently anticipating in his objections the line of questioning the government was about to pursue (see, *e.g.*, Tr. 169-171).

In view of the fact that the competence of petitioner's defense counsel is established by his actual performance at trial—a matter ascertainable from the record—there is no merit to petitioner's contention (Pet. 13-14) that he was entitled to a hearing on his ineffective assistance claim. Allegations concerning lack of preparation are irrelevant where it appears that counsel conducted the defense in a reasonably competent manner, and where there are no specific claims concerning particular testimony or other evidence that could have made a difference in the case and that counsel failed to present. Petitioner's assertion in his affidavit and in this Court (Pet. 3) that he "knew several persons who could have disputed parts of the Government's proof" was too vague and conclusory to require a hearing in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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